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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1969

No. 604

HELEN WEBER,
Petitioner,

vs.

RALPH AOKI, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Of Counsel

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PETITION FOR A WRIT
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FOR THE NINTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the per curiam opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on April 23, 1969. (Appendix 1.)

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Ninth Circuit is reported in Volume 405 Federal Reporter 2d Series at Page 844 and Appendix 1. The order of the District Judge is set forth in the record at Page 72, and Appendix 2.

JURISDICTION

The Petitioner is a creditor of, and was formerly President, of Weber Trucking & Equipment Rental, Inc., which filed a Petition for Reorganization under Chapter X of the Bankruptcy Act, in the United States District for Hawaii (R. 2). Subsequently, the proceedings for reorganization were dismissed and the corporation was adjudged a bankrupt (R. 32). Petitioner objected to the acceptance of a $5,000 offer of compromise of a $56,201.61 debt owed the bankrupt estate by J. P. Finan General Contractor, Inc.

A Petition for Review was heard by the United States District Court for Hawaii and dismissed (R. 62-63).

An appeal to the Ninth Circuit Court of Appeals was taken. The per curiam opinion of the United States Court of Appeals affirmed the decision of the District Court (Appendix 2).

The jurisdiction of the United States District Court for Hawaii was conferred by the Bankruptcy Act, Section 2A, also:

11 U. S. C. Section 11(a);

28 U. S. C. Section 1334;

11 U. S. C. Section 46(a).

Jurisdiction of the United States Court of Appeals for the Ninth Circuit was conferred by:

11 U. S. C. Section 47(a);

28 U. S. C. Section 1291.

The jurisdiction of the Supreme Court of the United States is conferred by:

11 U. S. C. Section 47(c);

28 U. S. C. Section 1254(1).

The Honorable Justice W. O. Douglas by Order dated August 1, 1969, extended the time for filing the Petition for Certiorari, to and including September 17, 1969.

QUESTIONS PRESENTED

Whether it was an abuse of discretion for the Referee in Bankruptcy to accept a $5,000 token offer of compromise of a $56,201.61 obligation owed to the bankrupt estate when the token offer was admittedly "picked out of the air" and was refuted by the evidence.

STATEMENT OF THE CASE

Weber Trucking & Equipment Rental, Inc., hereinafter referred to as "Weber, Inc.", initially filed a Petition for Reorganization under Chapter X of the Bankruptcy Act (R. 2).

Weber, Inc. was a small corporation and its working capital was tied up (Balance Sheet Exhibit "B" attached to the Debtor's Petition).

Much of its working capital was tied up in the obligation owed to it by J. P. Finan General Contractor, Inc., hereinafter referred to as "Finan, Inc." The amount of this obligation was $56,201.61 (R. 39).

Weber, Inc. had filed suit to collect this debt prior to filing its Petition for Reorganization. However, Finan, Inc. thereafter filed a countersuit claiming Weber, Inc. owed it $61,084.61 (R. 39).

The Trustee's sole basis for requesting the Bankruptcy Court to accept this token compromise, was Exhibit "A" attached to the Trustee's Petition (R. 41).

Exhibit "A" was a letter from Finan, Inc.'s attorney requesting the Trustee to accept $5,000 in compromise of the $56,201.61 debt owed by Finan, Inc. (R. 41).

When Helen Weber, a creditor, and also formerly President of Weber, Inc., learned that the Trustee intended to accept the $5,000 token

compromise offered by Finan, Inc., she filed a Petition requesting the Referee to disallow Finan, Inc.'s token compromise offer (R. 41-A and B).

The affidavit of H. R. Weber, in support of Petition for Disallowance made two very important points, never refuted (R. 41-C and 41-D), to wit:

(1) That as General Manager of Weber, Inc., affiant was familiar with the work performed by Weber, Inc. for Finan, Inc. and that Finan, Inc. had admitted it owed $24,154.00 on merely the subcontracts, to Weber, Inc., (as against Weber, Inc.'s claim of $25,880.81) (R. 41-C and D).

(2) That the balance owed by Finan, Inc. to Weber, Inc. for the "Extras" could be established from the books of account of Finan, Inc. and the subpoening of its accountant.

Until Weber, Inc.'s attorney was replaced by the attorney for the Trustee in Bankruptcy, pre-trial efforts to obtain the details of Finan, Inc.'s alleged counterclaim were unavailing and vigorously opposed by Finan, Inc. (R. 39 and 68).

Because of the depletion of its working capital, Weber, Inc. was on November 1, 1966, adjudged a bankrupt (R. 32).

Pursuant to an order of the Bankruptcy Court, the attorney for the Trustee in

Bankruptcy on January 13, 1967, replaced Weber, Inc.'s attorney in the suit against Finan, Inc. for the collection of the $56,201.61 debt (R. 36 and R. 37-B).

No attempt was ever made by the Trustee, or his attorney, to obtain any details of Finan, Inc.'s alleged counterclaim, through pretrial discovery proceedings (R. 66), in spite of Weber, Inc. showing that the counterclaim was an absolute sham (R. 69).

Since it was admitted that the $5,000 offer was simply "picked out of the air" by Finan, Inc.'s attorney; and as H. R. Weber's affidavit indicated that the counterclaim filed by Finan, Inc. was a sham, and, as the Trustee had never even examined or checked the books of account of Finan, Inc. to determine whether such records proved that the counterclaim was a sham, and that the $56,201.61 was owed Weber, Inc.; the Petitioner strenuously objected to the Referee's acceptance of the compromise, a fortiori, because there was absolutely no evidence to support such a compromise.

With no evidence to support Finan, Inc.'s offer, asking that the Referee compromise the $56,201.61 debt for $5,000 and, the affidavit of H. R. Weber (R. 41-C and D) showing that Finan, Inc.'s counterclaim was a sham, and, that a large portion of the obligation was admittedly owed by Finan, Inc., the Referee in Bankruptcy nevertheless stated that the compromise would be accepted. Upon being faced with this ruling by the Referee, the attorney for

Weber, Inc., at a hearing before the Referee, called as witnesses, J. P. Finan, his accountant and his bookkeeper. Not a single one of these witnesses could support the alleged counterclaim or the compromise offered (Clerk's minutes, Record 92 and tape recording).

Regardless of these facts, and the evidence, showing that the compromise should not be accepted, the Referee nevertheless held that the token offer would be accepted (R. 42-44).

It was so obvious that Finan, Inc. owed the $56,201.61 and that the counterclaim was a sham, that Petitioner asked the Referee to have the books of account of Finan, Inc. examined at Petitioner's expense, in order to prove that the $56,201.61 was owed (R. 69). The Referee refused this simple request, even though it was a request which would have cost the court not a cent, but on the contrary, could have brought in for the Bankruptcy Court, $56,201.61, instead of the $5,000 tendered by Finan, Inc.

Under these circumstances, Petitioner filed this Petition for a Writ of Certiorari to this Honorable Court.

SPECIFICATION OF ERRORS

The Ninth Circuit Court of Appeals erred because:

1. The acceptance of Finan, Inc.'s token compromise offer was an abuse of discretion and an arbitrary action, as a matter of law.

2. The only basis for accepting the compromise was the conterclaim, and the token offer, made by the attorney for Finan, Inc. The affidavit of H. R. Weber showed that Finan, Inc.'s counterclaim was a sham. It was thus error to accept Finan, Inc.'s $5,000 token offer in settlement of its debt of $56,201.61.

3. There was not a scintilla of evidence to support the compromise offer.

REASONS FOR GRANTING THE WRIT

The law involved in this case is well settled. There is no dispute, in this case, with respect to the facts or the law.

The advisability of accepting or rejecting a compromise is determined by the Court, exercising sound judicial discretion.

As hereinafter pointed out, the Court never placed itself in a position to exercise sound judicial discretion.

The Court never determined or even inquired whether the counterclaim was a sham. The evidence before the Court showed that it was a sham. It was an abuse of discretion to accept $5,000, in settlement of the $56,201.61 debt owed by Finan, Inc. when the evidence showed that the counterclaim was a sham.

Until a determination was made by the Court, it could only engage in rank speculation. Speculation is not an exercise of sound judicial discretion.

THE EVIDENCE BEFORE THE REFEREE SHOWED THAT IT WAS A CLEAR ABUSE OF DISCRETION TO ACCEPT THE $5,000 OFFER OF COMPROMISE.

No one ever examined the books and records of account of Finan, Inc. And, Finan, Inc. resisted all efforts to do so.

The affidavit of H. R. Weber showed that Finan, Inc.'s alleged counterclaim was a complete sham (R. 41-C and D). There was no proof to the contrary. And, the other evidence before the Referee confirmed the facts in the affidavit.

Thus, (1) the fact that Finan, Inc. solicited the Referee to accept a compromise and even offered to pay $5,000 additional for that purpose, refuted Finan, Inc.'s claim that it had a counterclaim of $61,084.61 against Weber, Inc.

(2) obviously if the books of account proved Weber, Inc. owed Finan, Inc. more money ($61,084.61) than was claimed by Weber, Inc. ($56,201.61), Finan, Inc. would not pay to the Referee one dollar much less $5,000. This would result in a loss of $10,000 by Finan, Inc. ($61,084.61 + $5,000 = $66,084.61) against the debt due Weber, Inc. of merely $56,201.61.

In view of these facts and the affidavit of H. B. Weber, the Referee abused his discretion in accepting the compromise (R. 41-C and D).

Only the books of account of Finan, Inc. would show (nothing else) whether there was a basis for accepting less than the amount owed Weber, Inc., to wit, $56,201.61.

There could be absolutely no exercise of any judicial discretion until the Referee determined whether Finan, Inc. had a counterclaim or whether it was a sham. All the evidence before the Referee showed that the counterclaim was a sham.

It was an abuse of discretion to accept the offer of compromise made by Finan, Inc. under these facts and circumstances.

The affidavit of H. R. Weber showed that Finan, Inc. had "admitted that it owes the Bankrupt $24,154.00" (on merely "the subcontracts") (R. 41-C).

Under these facts the acceptance by the Referee of Finan, Inc. 's $5, 000 token offer of compromise was a clear abuse of discretion.

This evidence clearly showed that Finan, Inc. 's $5, 000 offer of compromise should have been rejected.

Furthermore, assuming arguendo that the affidavit of H. R. Weber had not even been filed and was not of record, nevertheless, it would have still been a clear abuse of discretion for the Referee to accept the compromise offered by Finan, Inc. Because, the basis for the compromise was the claim by Finan, Inc. that Weber, Inc. owed it $61, 084. 61, whereas Weber, Inc. only claimed $56, 201. 61 was owed to it by Finan, Inc.

Only the books of account of Finan, Inc. would show whether its claim was supported by its records of account.

Until these records were examined it would be impossible to know whether any compromise should be accepted.

There could be no exercise of judicial discretion until that examination was made.

Because H. R. Weber knew that the counterclaim was a sham, he not only requested that Finan, Inc. 's books be examined (R. 41-D) but he even offered to pay the costs of the examination of Finan, Inc. 's books of account. However,

the Referee refused to allow such an examination even at no cost to the bankruptcy estate.

All the evidence before the Referee clearly proved that the compromise should have been rejected.

ACCEPTANCE OF THE COMPROMISE WAS AN ERROR AS A MATTER OF LAW.

The Trustee's Petition for Leave to Compromise was founded upon "Exhibit A" attached thereto (R. 41). "Exhibit A" was merely a letter from Finan, Inc.'s own attorney, asking for acceptance of the compromise and offering to pay $5,000 (R. 41).

"Exhibit A" was actually the Red Flag of warning to the Referee.

If in truth Weber, Inc. already owed $5,000 to Finan, Inc. as pretended in its counterclaim, it obviously would not have offered to pay the Referee another $5,000.

On the contrary, Finan, Inc. would be making a claim with the Referee for the $5,000 already claimed to be due and owing to it. Finan, Inc. would not make an offer to pay out another $5,000. These are obvious truths.

CONCLUSION

It was error and, a clear abuse of discretion for the Referee to accept the $5,000 offer in compromise of the $56,201.61 debt, because

(1) The affidavit of H. R. Weber showed that Finan, Inc. had admitted that it owed $24,154.00 (on merely the subcontracts).

(2) And, the affidavit was not disputed or challenged.

The affidavit and other facts before the Referee showed that Finan, Inc.'s counterclaim was a sham. Consequently, Finan, Inc. had resisted all efforts to examine its books of account.

Arguendo, until Finan, Inc.'s books of account were examined, it was impossible for the Referee to know whether any compromise should be accepted. The Referee therefore acted blindly in accepting the $5,000 proffered by Finan, Inc.

Acting blindly or engaging in rank speculation is not an exercise of judicial discretion. It is an arbitrary action, and it was an arbitrary decision by the Referee. This constituted a clear abuse of discretion.

Therefore, Certiorari, it is respectfully submitted, should be granted.

ROBERT B. DODGE

Attorney for Petitioner.

JOHN E. PARKS

Of Counsel

APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN WEBER,

Appellant,

vs. NO. 22,770

RALPH AOKI, Trustee,

Appellee.

(April 23, 1969)

Appeal from the United States District Court
for the District of Hawaii

Before: HAMLEY, MERRILL and ELY,
Circuit Judges

PER CURIAM:

Our examination of the record convinces us that the district court did not abuse its discretion in confirming the order of the referee in bankruptcy approving the compromise agreement which appellant attacks. We therefore

Affirm.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In the Matter of

WEBER TRUCKING & EQUIPMENT RENTAL, INC.,

Bankrupt.

In Bankruptcy No. 66-185

ORDER

At Honolulu, Hawaii, in said District, on the 18th day of September, 1967.

The Petition of Helen Weber, filed herein on April 27, 1967 for review of the Referee's approval of the compromise of the claim of the above named Bankrupt against J. P. Finan General Contractor, Inc. dated June 24, 1966, having come on regularly to be heard upon notice duly given to the parties herein on September 11 and 12, 1967 and the Trustee Ralph S. Aoki appearing by his attorney, Hiroshi Sakai, and Helen Weber appearing by her attorney, John Parks and J. P. Finan General Contractor, Inc. appearing by its attorney, Leslie T. Bennett and a hearing having been

held at which the record of the two hearings before the Referee on the Trustee's Petition for Leave to Compromise said claim was considered and the Court having considered said Petition and such record, the Findings of Fact and Conclusions of Law of said Referee, and the argument of counsel.

The Court finds that the counsel for the Petitioner Helen Weber was given every opportunity at the two hearings before the Referee to go into all of the details of the proposed compromise; that the Referee was satisfied that the compromise should be approved; that the Petitioner Helen Weber has the burden to show that the action of the Referee was clearly erronesou; that Petitioner has shown nothing and stated nothing to the Court to show that the action of the Referee was clearly erroneous; that the evidence before this Court and that which was before the Referee compels this Court to find that the Referee's conclusions based on his Finding of Facts were not completely erroneous, all as more fully set out in the oral Decision in the record herein.

IT IS THEREFORE, ADJUDGED, ORDERED AND DECREED:

1. That the Order of the Referee in approving the Trustee's Petition for Compromise on April 20, 1967 be and it hereby is affirmed.

2. That the Petition for Review filed

herein be and the same is hereby denied.

3. That the Motion for Dismissal of The Referee's Findings of Facts and Conclusions of Law filed herein on July 13, 1967 nunc pro tunc as of April 20, 1967 be and the same is hereby denied.

4. That the Trustee is directed forthwith to accept said compromise sum of $5,000.00 approved by the Referee and to enter into a stipulation for dismissal with prejudice of Civil No. 19448 in the First Judicial Circuit Court, State of Hawaii, Weber Trucking and Equipment Rental, Inc., Plaintiff vs. J. P. Finan General Contractor, Inc., Defendant, and Communications Satellite Corporation and First National Bank of Hawaii, Garnishees, and to release the Garnishees named therein.

DATED: Honolulu, Hawaii, this 18th day of September, 1967.

/s/ Martin Pence

DISTRICT JUDGE

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OCTOBER TERM, 1969

No. 604

HELEN WEBER,

Petitioner,

vs.

RALPH AOKI, Trustee,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1969

No. 604

HELEN WEBER,

Petitioner,

vs.

RALPH AOKI, Trustee,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ralph Aoki respectfully moves to have this Honorable Court deny the Petition for Writ of Certiorari on the grounds:

1. The Petitioner has failed to fulfill any of the considerations governing review on certiorari as provided in Rule 19 of the Rules of the Supreme Court of the United States.

2. That Petitioner has appealed from two orders denying Petitions for Rehearings in the United States District Court for the District of Hawaii.

3. The referee in Bankruptcy, United States District Court for the District of Hawaii and United States Court of Appeals for the Ninth Circuit were all satisfied that there was no "abuse of discretion."

OPINIONS BELOW

The Order of the District Court of Hawaii denying the first Petition for Rehearing was entered on November 21, 1967 and is set forth in the record at page 71, and Appendix A-1. The Order of the District Court of Hawaii denying the second Petition for Rehearing was entered on December 27, 1967 and is set forth in the record at page 78, and in Appendix A-3.

JURISDICTION

The Notice of Appeal filed on January 18, 1968 (R. 79) to the Ninth Circuit Court of Appeals was from two District Court orders denying rehearings on November 21, 1967 (R. 71) and on December 27, 1967 (R. 78) and is set forth in the record at page 79, and in Appendix A-4.

The Ninth Circuit Court of Appeals does not have jurisdiction on appeals taken from two orders denying petitions for rehearing.

None of the considerations governing review on certiorari has been presented by the Petitioner.

QUESTIONS PRESENTED

1. Whether this Honorable Court has jurisdiction to consider the granting of certiorari when Petitioner:

   a. Has failed to indicate any reasons for granting certiorari as provided in Rule 19 of the Rules of the Supreme Court of the United States:

   b. Has appealed from two District Court Orders denying petitions for rehearing.

2. Whether an appeal lies from an Order, Findings of Fact and Conclusions of Law of the Referee in Bankruptcy affirmed by the District Court of Hawaii and the Ninth Circuit Court of Appeals when there has been no showing of any abuse of discretion.

STATEMENT

The Order of the Referee in Bankruptcy approving the Trustee's Petition for Compromise was filed with the District Court of Hawaii on April 20, 1967 (R. 42).

The Findings of Fact and Conclusions of Law (R. 52) were filed by the Referee in Bankruptcy on July 12, 1967, nunc pro tunc as of April 20, 1967 and in said Findings the Referee found that the litigation would result in the Trustee and his attorney spending considerable time in the proof of claims, the liability of the entire claim not being clearly established and the respective back charges and other counterclaim being made by J. P. Finan General Contractor, Inc. He further stated that it would be advisable and prudent to accept the compromise proposal offered by J. P. Finan General Contractor, Inc.

The District Court of Hawaii entered an Order on September 18, 1967 finding that the action of the Referee was not clearly erroneous and that the counsel for the Petitioner was given every opportunity to go into the details of the proposed compromise and that the Referee was satisfied that the compromise should be approved. (R. 72, Petitioner's Brief Appendix B-1 through B-3)

No Notice of Appeal to the Ninth Circuit Court of Appeals was filed by the Petitioner from the Order entered by the District Court of Hawaii on September 18, 1967 affirming the action of the Referee and the appeal period expired on November 18, 1967.

ARGUMENT

I

THE PETITIONER FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 19 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

In the present request for review by certiorari the Petitioner has failed to point out any conflict with the decisions of this Honorable Court, failed to show any conflict of decisions among the Circuit Court of Appeals and has failed to show any constitutional question.

II

AN APPEAL DOES NOT LIE FROM THE TWO DISTRICT COURT ORDERS DENYING THE PETITIONS FOR REHEARING.

The Ninth Circuit Court of Appeals did not have jurisdiction to entertain Petitioner's Appeal which was from two District Court orders denying the petitions for rehearing. (R. 79, Appendix A-4)

Conboy v. First National Bank of Jersey City, 203 U.S. 141 (1906).

III

THE NINTH CIRCUIT COURT OF APPEALS WAS SATISFIED THAT THE DISTRICT COURT OF HAWAII DID NOT ABUSE ITS DISCRETION IN CONFIRMING THE ORDER OF THE REFEREE IN BANKRUPTCY APPROVING THE COMPROMISE AGREEMENT WHICH PETITIONER ATTACKS.

General Order 47 of the Bankruptcy Rules specifically provides that unless the Referee's Findings of Fact are clearly erroneous the United States District Court shall accept them.

Contrary to the various allegations made by the Petitioner in her brief it was found by the Referee that it would be advisable and prudent to accept the compromise proposal offered by J. P. Finan General Contractor, Inc. (R. 52). The District Court of Hawaii found that the action of the Referee was not clearly erroneous and confirmed the same (R. 72). The Ninth Circuit Court of Appeals affirmed the action of the United States District Court finding that there was no abuse of discretion. (405 F. 2d 844).

The District Court of Hawaii and the Ninth Circuit Court of Appeals are required to accept the Findings of the Referee in Bankruptcy unless such findings are clearly erroneous.

Farmer Brothers Company v. Huddle Enterprises, Inc., 366 F.2d 143 (C.A. 9, 1966);

Washington v. Houston Lumber Company, 310 F.2d 881, (C.A. 10, 1962);

In re Knollhoff, 239 F. Supp. 927 (D.C. Kan., 1965).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully denied,

JAMES M. MORITA,

Attorney for Respondent
Ralph Aoki

HIROSHI SAKAI
Of Counsel

APPENDIX

IN THE

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF HAWAII

In the Matter of	)	
WEBER TRUCKING & EQUIPMENT RENTAL, INC.,	)	In Bankruptcy No. 66-185
Bankrupt.	)	

ORDER

At Honolulu, Hawaii, in said District, on the 21st day of November, 1967.

The Petition for Rehearing by Helen F. Weber, filed herein on September 26, 1967 on the Order of the Court entered herein on September 18, 1967 having come on regularly to be heard upon notice duly given to the parties herein and the Trustee Ralph S. Aoki appearing by his attorney Hiroshi Sakai and Helen F. Weber appearing by her attorney John Parks and a hearing having been held and the Court having considered the Petition for Rehearing and the Record and the argument of counsel,

IT IS THEREFORE, ADJUDGED, ORDERED AND DECREED that the Petition for Rehearing by Helen F. Weber be and the same is hereby denied.

DATED: Honolulu, Hawaii, this 21st day of November, 1967.

/s/ C. Nils Tavares

District Judge

IN THE

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF HAWAII

In the Matter of	)	
	)	
WEBER TRUCKING & EQUIPMENT RENTAL, INC.,	)	In Bankruptcy No. 66-185
	)	
Bankrupt.	)	

RULING ON MOTION FOR REHEARING

It appearing to this court that no new matter, not heretofore considered and passed upon by this court, is presented by Helen F. Weber in her "Motion for Hearing" of November 29, 1967, her motion is DENIED, without argument.

DATED: Honolulu, Hawaii, this 27th Day of December, 1967.

/s/ Martin Pence

United States District Judge

IN THE

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF HAWAII

In the Matter of WEBER TRUCKING & EQUIPMENT RENTAL, INC., Bankrupt.	)	In Bankruptcy No. 66-185

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Helen F. Weber hereby appeals to the United States Court of Appeals for the Ninth Circuit from the ruling on Motion for Rehearing entered and filed herein on the 27th day of December 1967 and from the Order entered and filed herein on November 21, 1967.

DATED, Honolulu, Hawaii, this 18th day of January 1968.

HELEN F. WEBER

By /s/ John E. Parks

John E. Parks
Attorney for Helen F. Weber
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Honolulu, Hawaii 96813

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